

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
Date: September 15, 2016
Resolution No.: L-509

RESOLUTION

**RESOLUTION AUTHORIZING DISCLOSURE OF RECORDS OF
THE CALIFORNIA PUBLIC UTILITIES COMMISSION SAFETY
AND ENFORCEMENT DIVISION'S INVESTIGATION AN
ELECTRIC INCIDENT THAT OCCURRED ON JUNE 19, 2012
AT PACIFIC GAS AND ELECTRIC'S KERN POWER PLANT.**

BACKGROUND

The California Public Utilities Commission ("Commission") received a request seeking disclosure of the Commission Safety and Enforcement Division's investigation records of an electric incident that occurred on June 19, 2012 at Pacific Gas and Electric's Kern Power Plant. The Commission staff could not make the investigation records public without the formal approval of the full Commission. The request is treated as an appeal to the full Commission for release of the requested records pursuant to Commission General Order (G.O.) 66-C § 3.4.

DISCUSSION

The requested records are "public records" as defined by the California Public Records Act ("CPRA").¹ The California Constitution, the CPRA, and discovery law favor disclosure of public records. The public has a constitutional right to access most government information.² Statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.³ New statutes, court rules, or other authority that limit the right of access must be

¹ Cal. Gov't. Code § 6250, *et seq.*

² Cal. Const. Article I, § 3(b)(1).

³ *Id.* Cal. Const. Article I, § 3(b)(2).

adopted with findings demonstrating the interest protected by the limitation and the need to protect that interest.⁴

The CPRA provides that an agency must base a decision to withhold a public record in response to a CPRA request upon the specified exemptions listed in the CPRA, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.⁵

The Commission has exercised its discretion under Cal. Pub. Util. Code § 583, and implemented its responsibility under Cal. Gov't. Code § 6253.4(a), by adopting guidelines for public access to Commission records. These guidelines are embodied in G.O. 66-C. General Order 66-C § 1.1 provides that Commission records are public, except “as otherwise excluded by this General Order, statute, or other order, decision, or rule.” General Order 66-C § 2.2 precludes Commission staff’s disclosure of “[r]ecords or information of a confidential nature furnished to or obtained by the Commission ... including: (a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.” General Order 66-C § 2.2(a) covers both records provided by utilities in the course of a Commission investigation and investigation records generated by Commission staff.

Because G.O. 66-C § 2.2(a) limits Commission staff’s ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure, Commission staff denies most initial requests and subpoenas for investigation records. Commission staff usually informs requestors that their subpoena or public records request will be treated as an appeal under G.O. 66-C § 3.4 for disclosure of the records.

There is no statute forbidding disclosure of the Commission’s safety investigation records. With certain exceptions for incident reports filed with the Commission, we generally refrain from making most accident investigation records public until Commission staff’s investigation of the incident is complete. Commission staff and management need to be able to engage in confidential deliberations regarding an incident investigation without concern for the litigation interests of plaintiffs or regulated entities.

⁴ *Id.*

⁵ The fact that records may fall within a CPRA exemption does not preclude the Commission from authorizing disclosure of the records. Except for records subject to a law prohibiting disclosure, CPRA exemptions are discretionary, rather than mandatory, and the Commission is free to refrain from asserting such exemptions when it finds that disclosure is appropriate. *See* Cal. Gov’t. Code § 6253 (e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656.

The Commission has ordered disclosure of records concerning completed safety incident investigations on numerous occasions.⁶ Disclosure of such records does not interfere with its investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the accident or incident under investigation.⁷ Most of these resolutions responded to disclosure requests and/or subpoenas from individuals involved in electric or gas utility accidents or incidents, the families of such individuals, the legal representatives of such individuals or families, or the legal representatives of a defendant, or potential defendant, in litigation related to an accident or incident.

Portions of incident investigation records which include personal information may be subject to disclosure limitations in the Information Practices Act of 1977 (“IPA”).⁸ The IPA authorizes disclosure of personal information “[p]ursuant to the [CPRA].”⁹ The CPRA exempts personal information from mandatory disclosure, where disclosure would constitute an unwarranted invasion of personal privacy.¹⁰ Incident investigation records may include information subject to the lawyer-client privilege, official information privilege, or similar disclosure limitations. The CPRA exempts such information from disclosure.¹¹

The Commission has often stated that Cal. Pub. Util. Code § 315, which expressly prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, “as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property,” offers utilities sufficient protection against injury caused by the release of requested investigation records.

The Commission investigation of the electrical incident was completed as of August 31, 2014; therefore, the public interest favors disclosure of the requested Commission’s investigation records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission’s lawyer-client or other privilege.

⁶ Where appropriate, the Commission has redacted portions of investigation records which contain confidential personal information, the disclosure of which would constitute an unwarranted invasion of privacy, and other exempt or privileged information.

⁷ See, e.g., Commission Resolutions L-240 *Re San Diego Gas & Electric Company*, rehearing denied in Decision 93-05-020, (1993) 49 P.U.C. 2d 241; L-309 *Re Corona* (December 18, 2003); L-320 *Re Knutson* (August 25, 2005).

⁸ Cal. Civ. Code § 1798, *et seq.*

⁹ Cal. Civ. Code § 1798.24(g).

¹⁰ Cal. Gov’t. Code § 6254(c).

¹¹ Cal. Gov’t. Code § 6254(k).

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on August 12, 2016, in accordance with Cal. Pub. Util. Code § 311(g). PG&E submitted timely comments to the Commission's Legal Division on September 6, 2016. No reply comments were received.

PG&E comments that the Draft Resolution should be "modified to recognize that certain trade secret information contained in the Kern-related records should be withheld from public disclosure." Specifically, PG&E seeks to redact "(1) The weighting that PG&E applied to bid price when scoring bids for the Kern demolition; and (2) information concerning the winning contractor's price relative to the next closest bidder."

PG&E asserts that this information is subject to redaction pursuant to General Order 66-C, Paragraphs 2.2(b) and 2.8. PG&E argues that these General Order provisions allow the Commission to withhold or redact information in the nature of a trade secret that, if revealed publicly, would place a regulated entity at an unfair business disadvantage as well as information obtained in confidence from an unregulated entity where disclosure would not be in the public interest.

PG&E argues that bid scoring and bid pricing information "could allow bidders to manipulate PG&E's bidding process, to the detriment of PG&E's customers," that bids submitted to it were submitted as proprietary and confidential by the bidders, and that "disclosure of the relative difference between Cleveland's bid and the next-lower bid could lead to collusion among bidders in future solicitations."

Finally, PG&E also requests that the Commission withhold from disclosure records that, if disclosed, "could (1) jeopardize the safety of PG&E's facilities, operations, employees, or public, (2) constitute an unwarranted invasion of personal privacy . . ." PG&E does not identify with more specificity the records that it refers to here.

The Commission's Draft Resolution already reserves to the Commission the right to redact or withhold documents that contain information that would present an unwarranted invasion of personal privacy if publicly revealed, or are otherwise subject to the Commission's lawyer-client or other privilege. One such privilege, the official information privilege, set forth in Cal. Evid. Code § 1040 covers information acquired in confidence by Commission employees during the course of their duties, and not open or officially disclosed to the public, where either disclosure is forbidden by an act of Congress or a state statute, or disclosure is against the public interest because there is a need for confidentiality that outweighs the necessity for disclosure in the interests of justice. This privilege

allows the Commission, in appropriate circumstances, to withhold information that could, if disclosed, jeopardize utility and public safety. This privilege is also broad enough to encompass information subject to the trade secret privilege set forth in Cal. Evid. Code § 1060 and Cal. Civ. Code § 3426.1, where a utility or other regulated entity submits such information to the Commission in confidence with an assertion that such information is subject to the privilege, and adequately demonstrates that such information meets all of the statutory elements necessary for trade secret protection.

The Commission will continue to exert its authority to withhold privileged information and/or documents and, should information subject to an applicable privilege be found, redact or withhold that information from public disclosure, as appropriate.

FINDINGS OF FACT

1. The Commission received a request which seeks disclosure of the Commission's investigation records concerning an electric incident that occurred on June 19, 2012 at Pacific Gas and Electric's Kern Power Plant
2. Access to the records in the Commission's investigation file was denied in the absence of a Commission order authorizing disclosure.
3. The Commission investigation of the electric incident that occurred on June 19, 2012 at Pacific Gas and Electric's Kern Power Plant was completed as of August 31, 2014; therefore, the public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

CONCLUSIONS OF LAW

1. The documents in the requested Commission's investigation file and report are public records as defined by Cal. Gov't. Code § 6250, *et seq.*
2. The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. Furthermore, the California Constitution also requires that statutes, court rules, and other authority favoring disclosure be broadly construed, and that statutes, court rules, and other authority limiting disclosure be construed narrowly; and that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the

interest served by keeping information from the public and the need to protect that interest. Cal. Const. Article I, §§ 3(b)(1) and (2).

3. The general policy of the CPRA favors disclosure of records.
4. Justification for withholding a public record in response to a CPRA request must be based on specific exemptions in the CPRA or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Gov't. Code § 6255.
5. Cal. Gov't Code § 6254(c) exempts from mandatory disclosure personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy.
6. Cal. Gov't Code § 6254(k) exempts from disclosure records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.
7. The Commission has exercised its discretion under Cal. Pub. Util. Code § 583 to limit Commission staff disclosure of investigation records in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. General Order 66-C § 2.2 (a).
8. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
9. Cal. Pub. Util. Code § 315 prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property."

ORDER

1. The request for disclosure of the Commission records concerning the investigation of an electric incident that occurred on June 19, 2012 at Pacific Gas and Electric's Kern Power Plant is granted, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.
2. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of September 15, 2016, and that the following Commissioners approved it:

TIMOTHY J. SULLIVAN
Executive Director

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
LIANE M. RANDOLPH
Commissioners

Commissioner Carla J. Peterman, being
necessarily absent, did not participate.